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Reporting the Truth and Setting the Record Straight: An Analysis of U.S. and Japanese Libel Laws

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STUDENT NOTE

REPORTING THE TRUTH AND SETTING THE RECORD STRAIGHT: AN ANALYSIS OF U.S. AND JAPANESE LIBEL LAWS

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Modern democracies face the constant challenge of balancing societal needs with individual interests.[1] This struggle is especially apparent in libel law, where the importance of advancing widespread debate on controversial issues often clashes with the common law right of individuals to be protected from defamatory falsehoods. Freedom of the press is considered a keystone of democracy, and its development has been central to the historical struggle for the rule of law.[2] The tort of defamation, on the other hand, begins with the premise that an individual's reputation should be protected from false words that might injure it.[3] A central task of modern defamation law, therefore, is to reconcile society's interest in robust and truthful speech with the individual interest in reputation. The appropriate balance cannot allow absolute protection of one at the expense of the other.[4]

The United States has chosen to weigh this balance in favor of press freedoms, while arguably neglecting to protect individuals' reputations. Libel plaintiffs, especially public figures, face the difficult task of overcoming the media's strong constitutional protections. In order to prevail, the plaintiff must prove the media acted recklessly, maliciously, and without regard for the truth in publishing the alleged defamation. The media's ability to prove the truth of the statement is far less important than its intent in making the statement.[5]

In contrast, Japan has developed an approach to libel weighted more toward protecting individual interests. Under Japanese law, the media

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1. *See* Nobushige Ukai, *The Signification of the Reception of American Constitutional Institutions and Ideas in Japan, in* CONSTITUTIONALISM IN ASIA: ASIAN VIEWS OF THE AMERICAN INFLUENCE 114, 120–21 (Lawrence W. Beer ed., 1979).

2. Pnina Lahav, *Conclusion: An Outline for a General Theory of Press Law in Democracy, in* PRESS LAW IN MODERN DEMOCRACIES: A COMPARATIVE STUDY 339 (Pnina Lahav ed., 1985) [hereinafter PRESS LAW].

3. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 177 (5th L. Ed. 1984).

4. RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 1066 (5th ed. 1990).

5. *See infra* part I.A.

carries the burden of proving truth as a defense to the alleged defamation. Remedies focus less on compensation and more on restoring the defamed individual's place in society.[6]

Although Japan places seemingly stiffer standards on media defendants in libel suits, when viewed against the backdrop of the countries' respective cultures, the U.S. and Japanese press enjoy similar freedoms. In terms of social development, however, Japanese libel law is more successful in addressing both the truthfulness of the offending statement and the individual's reputation in the larger community.[7] U.S. libel jurisprudence lacks the therapeutic societal benefits found under Japanese law.

Despite the cultural differences between the United States and Japan, the nations' respective approaches to libel law provide useful comparisons. The media industries of the two nations enjoy the highest total press circulation in the world,[8] and both nations are major world economic powers. In addition, both countries' constitutions contain similar free speech provisions.[9]

This Note argues that U.S. courts and lawmakers should adopt some aspects of Japanese libel law.[10] Part I compares the balances struck in U.S. and Japanese libel law between promoting press freedoms and protecting individual interests. Part II focuses on the extent to which

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6. *See infra* part I.B.

7. See the remedies discussion in *Okuri v. Kageyama.* Judgment of July 4, 1956 (Okuri v. Kageyama), Saikōsai [Supreme Court], 10 Minshū 785 (Japan), *translated in* THE JAPANESE LEGAL SYSTEM: INTRODUCTORY CASES AND MATERIALS 324 (Hideo Tanaka ed., 1988) [hereinafter JAPANESE LEGAL SYSTEM]. The Japanese Supreme Court ordered a political candidate to retract defamatory statements he made about his opponent during an election, stating that "[r]eputation is a social concept, and thus this type of notice of apologies can be recognized as a sensible and valid method for the restoration of the reputation of the injured party." *Id.*

8. THE INTERNATIONAL CENTER ON CENSORSHIP, ARTICLE 19, FREEDOM OF INFORMATION AND EXPRESSION IN JAPAN: A COMMENTARY AND THE 1988 REPORT SUBMITTED TO THE HUMAN RIGHTS COMMISSION BY THE GOVERNMENT OF JAPAN 16 (1989) [hereinafter ARTICLE 19 REPORT]. The report lists Japan as having the third largest media circulation behind the United States and the Union of the Soviet Socialist Republics. With the breakup of the former Soviet Union, the Japanese press may have moved into second place.

9. *See infra* notes 11–12 and accompanying text.

10. This Note uses the terms "libel" and "defamation" to refer only to defamation published in the conventional media, and not to defamation actions among private individuals. The term "press" is used to encompass both print and broadcast media, even though most libel suits in both countries are brought against newspapers and magazines. *See* LAWRENCE W. BEER, FREEDOM OF EXPRESSION IN JAPAN: A STUDY IN COMPARATIVE LAW, POLITICS, AND SOCIETY 316 (1984) (stating that most libel complaints in Japan are filed against newspapers and pulp magazines); RANDALL P. BEZANSON ET AL., LIBEL LAW AND THE PRESS: MYTH AND REALITY 242 (1987) (stating that most U.S. libel suits are filed against newspapers, with a significantly smaller proportion filed against television stations).

each system succeeds in addressing the objectives of encouraging aggressive, accurate reporting, and compensating libel victims. Finally, Part III proposes a new U.S. libel standard that would adopt, with some modifications, key elements of Japanese libel law without running afoul of established U.S. constitutional requirements.

I. LIBEL LAWS IN THE UNITED STATES AND JAPAN

Freedoms of speech and press in the United States and Japan are protected by similar provisions in each nation's constitution. The First Amendment of the U.S. Constitution holds that "Congress shall make no law . . . abridging the freedom of speech, or of the press[.]"[11] The Japanese Kenpō Article XXI promises that "[f]reedom of . . . speech, press and all other forms of expression are guaranteed. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated."[12]

Despite the similarities in the constitutional protection of press freedoms, U.S. and Japanese courts have developed different theories for examining the potential injuries and remedies connected with defamation. While the U.S. approach tends to view the costs of defamation in private terms, the Japanese method considers the injury in regard to how it affects society.[13] This difference is based, in part, on the countries' differing cultural traditions, and is evident at all levels of libel jurisprudence.

A. *Actual Malice: The U.S. Approach to Libel Litigation*

In the United States, libel jurisprudence developed around the theory that robust public debate provides the best insurance against tyranny. As articulated by John Stuart Mill, this classic libertarian argument held that suppression of opinion was wrong — regardless of its truth or falsity.[14] If the suppressed opinion were true, society would be denied the truth. If it were false, society would be denied the fuller understanding of the truth that results from the conflict between truth and falsity in the marketplace of ideas.[15] Mill believed that society would wholly embrace

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11. U.S. CONST. amend. I.

12. KENPŌ [Constitution] art. XXI (Japan), *translated in* 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1990) [hereinafter CONSTITUTIONS].

13. *See infra* part II.B. and text accompanying notes 34–37.

14. JOHN STUART MILL, ON LIBERTY 15–56 (Elizabeth Rapaport ed., 1978).

15. Justice Holmes was a strong proponent of Mill's approach. In *Abrams v. United States*, he wrote, "[T]he best test of truth is the power of the thought to get itself accepted in

only those truthful opinions that had been tested through debate and conflict.[16] Thus, under Mill's vision, free and open debate was essential to the workings of a representative government. The harm caused by the occasional falsehood that slipped undetected through the marketplace of ideas was simply one cost of a free press.

The U.S. Supreme Court embraced Mill's approach in *New York Times v. Sullivan*,[17] the decision that essentially brought the tort of defamation within the ambit of the First Amendment. The case involved the publication of a political advertisement inaccurately describing an incident involving police treatment of nonviolent protestors in Montgomery, Alabama, during the height of the Civil Rights Movement. In determining that the *New York Times* had not libeled the plaintiff, a Montgomery police commissioner, Justice Brennan noted that "[w]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[18]

In *Sullivan*, the Court added a requirement of actual malice to the elements that must be proved under the common law tort test for libel.[19] After the decision, public officials could only prevail in libel actions stemming from reports on their official activities by proving that the published statement in question identified them, defamed their character, and was made with actual malice — "knowledge that it was false or with

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the competition of the market . . ." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

16. "There is the greatest difference between presuming an opinion to be true because, with every opportunity for contesting it, it has not been refuted, and assuming its truth for the purpose of not permitting its refutation." MILL, *supra* note 14, at 18.

Mill's belief that truth must be tested through debate and conflict also provides a justification for the adversarial process which is the basis of American litigation.

17. 376 U.S. 254 (1964).

18. *Id.* at 270 (citations omitted).

19. The common law required the following elements to create liability for defamation:
(a) a false and defamatory statement concerning another;
(b) an unprivileged publication to a third party;
(c) fault amounting at least to negligence on the part of the publisher; and
(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

RESTATEMENT (SECOND) OF TORTS § 558 (1976). A defamatory communication was defined as one that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id.* § 559.

Defamatory statements under the common law were presumptively false because the law assumed people had good reputations. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 770 (1986). The *Sullivan* case and subsequent decisions arguably removed this presumption. *See id.* at 775.

reckless disregard of whether it was false or not."[20] The actual malice showing had to be made with "convincing clarity."[21] The decision effectively shifted the burden of proof to public-official plaintiffs; the media's ability to prove the truth of the offending statement was no longer a necessary defense. In media and academic circles, the *Sullivan* standard is generally, but not universally, viewed as an important safeguard to the press' ability to report on controversial government activities.[22]

In 1967, the Court extended the actual malice standard to encompass non-elected public figures in *Curtis Publishing Co. v. Butts*.[23] The case held that public figures — whether they achieved this status by position alone, or by thrusting themselves into the middle of a public controversy — were entitled to less protection than the average private citizen, but should receive more protection than was provided to public officials under the actual malice standard.[24] The public figure could succeed in a libel suit by demonstrating "a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[25] The Court extended the actual malice test to public figures[26] because their prominent positions rendered them functional equivalents of government officials. Thus, if the marketplace of ideas were to function properly, journalists had to be able to report activities of public figures without fear of unwarranted libel suits.

The public figure standard was later extended in *Rosenbloom v. Metromedia*[27] to include private persons caught up in matters of public

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20. *Sullivan*, 376 U.S. at 283.

21. *Id.* at 285–86.

22. *See, e.g.*, Harry Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 194 (arguing the decision "may prove to be the best and most important [the Court] has ever produced in the realm of freedom of speech"). *But see* LEE C. BOLLINGER, IMAGES OF A FREE PRESS 34–37 (1991) (noting that allowing the press more latitude for false reporting on public officials may ultimately injure society); David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 538 (1991) ("[I]t is now clear that however useful [the actual malice] rule may be, the costs it imposes on reputation, on public life, and on the press are substantial.").

23. 388 U.S. 130 (1967).

24. *Id.* at 154–55.

25. *Id.* at 155.

26. Wally Butts was the athletic director at the University of Georgia. *Id.* at 135. In the companion case of *Associated Press v. Walker*, General Edwin Walker was a retired Army officer who was involved in the controversy surrounding the entry of James Meredith into the University of Mississippi. *Id.* at 140.

27. 403 U.S. 29 (1971).

interest, even if their involvement was involuntary.[28] This decision effectively placed the burden of proving actual malice on all libel plaintiffs, regardless of their status, because, arguably, whatever editors chose to put in their newspaper was a public issue.

In 1974, the Court pulled back from its expansive definition of public figures in *Gertz v. Robert Welch, Inc.*[29] In *Gertz*, the Court rejected the public issue standard and held that plaintiffs who were not public figures could prevail by showing negligence on the part of the media defendant in reporting a defamatory statement.[30] The Court also ruled that public figures were not necessarily public figures at all times or in all aspects of their lives.[31] States were to decide whether defamatory statements, made against private individuals or public figures in their capacities as private citizens, could be judged under the negligence standard rather than the *Sullivan* actual malice standard.[32] Private-citizen plaintiffs, however, would not be able to recover punitive damages if they could not prove actual malice on the part of the media defendant.[33] Thus, the decision balanced the need to compensate wronged plaintiffs with the desire to avoid punishing the press unnecessarily for investigating and reporting on controversial issues.

The Court's commitment in *Sullivan* and its progeny to the market-place-of-ideas approach to libel law underscores a key philosophical difference between the United States and Japan in this area. In the United States, the injury an individual might suffer at the hands of "uninhibited, robust and wide-open debate" is viewed as an unfortunate byproduct of free speech.[34] Although people may complain privately about the media's power to injure individual reputations, litigants tend to

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28. *Id.* at 41–48.

29. 418 U.S. 323 (1974).

30. *Id.* at 345–48.

31. *Id.* at 345, 351–52.

32. *Id.* at 347. The Court determined that private figures, and those acting in the capacity of private figures, deserved more protection than public officials because "public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.* at 344. The difficulty of determining the plaintiff's status as a public or private figure has led the Court to make some rather fine distinctions. *See, e.g.*, Time, Inc. v. Firestone, 424 U.S. 448 (1976)(holding that a Palm Beach socialite was not a public figure simply because she was undergoing a divorce).

33. *Gertz*, 418 U.S. at 349–50. The Court has since held that showing actual malice is unnecessary for winning recovery of punitive damages in cases involving a private-figure plaintiff and speech of purely private concern. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

34. *See* BOLLINGER, *supra* note 22, at 37. ("[T]he Supreme Court today seems intent on ignoring the public dimension of the harmfulness of this kind of speech. The costs are regarded as exclusively private.").

recover in libel actions only when the media's behavior is truly egregious.[35] Moreover, the focus of the lawsuits tends to center on damages and the public-private status of the plaintiff.[36] In Japan, on the other hand, litigation tends to focus more on restoring the injured individual's place in society.[37]

The tendency in the United States to view the consequences of defamation in terms of purely private costs may have its roots in the American conception of the press and American history itself. A popular theory of the First Amendment's origin holds that the Constitution's drafters sought to prohibit the government from censoring publishers through a mandatory licensing system.[38] Thus, while the press in some nations acts as either an advocate or an official organ for the government,[39] the American mainstream media strives to act as a watchdog over government, sitting as the celebrated Fourth Estate — a quasi-branch of government serving as a check on the other three.[40] The public expects that in fulfilling its watchdog role, the press will remain independent of government control, neutral in its retelling of the facts,[41] and beyond societal conventions.[42] A coopted press is thought to be unable to point out society's shortcomings. Although the public may complain at times about some of the guerilla methods reporters use to obtain information,[43]

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35. Although plaintiffs who successfully get their cases before a jury tend to recover more than half of the time, a large proportion of U.S. libel decisions are overturned on appeal. *See* James C. Goodale, *Survey of Recent Media Verdicts, Their Disposition on Appeal, and Media Defense Costs, in* MEDIA INSURANCE AND RISK MANAGEMENT 1985, at 69, 81–86 (John C. Lankenau ed., 1985). It is interesting to note, however, that only about 24% of the libel cases filed in the United States between 1974 and 1984 went to trial. *See* BEZANSON et al., *supra* note 10, at 130.

36. BEZANSON et al., *supra* note 10, at 122–23.

37. *See generally*, JAPANESE LEGAL SYSTEM, *supra* note 7, at 320 (discussing the importance of a sincere apology as a remedy for defamation).

38. *See* ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES 18, 499 (4th prtg. 1948) (discussing the termination of press licensing laws in England and the American colonies); *see also* Near v. Minnesota, 283 U.S. 697, 713–18 (1931).

39. The government-operated press of the former Soviet Union is one example. More contemporary examples include the state-controlled media in Iran, Iraq, and Syria.

40. *See, e.g.*, BOLLINGER, *supra* note 22, at 55–57 (discussing the popular view of the autonomous press).

41. Note the widespread criticism NBC received after the public learned that its news division implanted incendiary devices on a General Motors' pickup truck to ensure the vehicle would burst into flames during a news report on a potential flaw in the truck's design. *See* Carleton R. Bryant, *Staging the News; NBC's Bang May Spark Scorn for All Media*, WASH. TIMES, Feb. 10, 1993, at A3; Jim Kenzie, *NBC Truck Fiasco Shows TV Journalism at Worst*, TORONTO STAR, Feb. 13, 1993, at G3; Pat Widder, *Playing With Fire: Blur of Fact and Fiction Costs NBC*, CHI. TRIB., Feb. 11, 1993, at 1.

42. *See* BOLLINGER, *supra* note 22, at 55.

43. Consider the widespread discussion prompted by the *Miami Herald*'s reporting of the

people have generally come to expect journalists to operate at the fringes of convention. Popular culture reinforces this impression with movies that portray intrepid reporters who will get the scoop by any means necessary.[44]

Thus, the United States has tilted the balance between enhancing the media's ability to publish controversial information and protecting the individual's right to safeguard one's reputation in favor of the press. The actual malice standard, as applied by U.S. courts, limits the ability of public officials and public figures to challenge the publication of allegedly false and defamatory information by imposing on them the burden of proving that the publisher was reckless in publishing the information.[45] While this approach clearly helps the media gather the news, it does little to promote the accuracy of information entering the marketplace of ideas.[46] Arguably then, the U.S. actual malice standard falls short of enhancing the press' role in fostering a truthful exchange of ideas and improving the quality of public debate. As Professor Bollinger argues, the public has an interest in not being misled by falsehoods.[47] Incorrect information and innuendo can cause harm by leading the public wrongly to vote qualified public officials out of office. Otherwise strong candidates may steer away from public life because they do not wish to bear the costs of potentially damaging statements about them in the press.[48] While protecting press freedom is clearly central to the workings of democracy, society does not benefit when the incentive to report the news accurately is diminished.

Furthermore, because the U.S. approach views defamation in purely private terms, the monetary awards granted successful libel plaintiffs do not address the need to repair the injured party's reputation or restore that

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Gary Hart-Donna Rice affair in 1987. After the Democratic presidential hopeful publicly challenged the media to catch him engaging in his oft-rumored practice of marital infidelity, two *Herald* reporters staked-out his home and reported that he spent much of one weekend with Rice, a 29-year-old model and actress. Although many journalists agreed they would have followed such a story, several questioned the methods used in obtaining the information. Thomas B. Rosenstiel, *Editors Back Reporting Hart Allegations; Some Question Methods and Thoroughness of Miami Writers*, L.A. TIMES, May 6, 1987, at 15; *see also* David S. Broder, *The Press is on Shaky Ground*, WASH. POST, Nov. 15, 1987, at C7.

44. *See, e.g.*, ALL THE PRESIDENT'S MEN (Warner Bros. 1976) (Hollywood account of the *Washington Post*'s coverage of Watergate).

45. *See supra* notes 17–22 and accompanying text.

46. Most libel litigation in the United States focuses on the status of the plaintiff, rather than the veracity of the alleged defamation. *See infra* notes 150–54 and accompanying text.

47. BOLLINGER, *supra* note 22, at 35.

48. *Id. See also* Anderson, *supra* note 22, at 531 ("The actual malice rule obviously deters participation in public life.") (citation omitted).

person's place in society.[49] Although money may help salve one's injured pride, it does not correct the misstatement that created the injury in the first place. Despite the compensation, the defamatory falsehood remains in the public debate, and the individual's reputation remains unvindicated. Society, in turn, is impaired because its members lack accurate information with which to make decisions, and some of its citizens suffer the unfair stigma of a wrongfully damaged reputation.

B. *Japanese Libel Law: Truth as a Defense*

While the United States' approach to libel embraces the notion of competitive ideas and individual injury in the diverse marketplace of ideas,[50] the Japanese vision focuses upon restoring the injured individual's reputation in a homogeneous, cohesive society. As discussed previously, U.S. law views libel in terms of the injured individual vis-à-vis the media defendant.[51] In contrast, Japanese law regards defamation more in terms of the effect it has on reducing respect for the individual in the community, or lowering the person in the estimation of others.[52] This treatment is based on Japan's cultural emphasis on group cohesion over personal autonomy, and is manifested in the remedies afforded libeled parties under Japanese law, including public apology.[53] In short, although the Japanese press enjoys a great deal of autonomy,[54] the legal balance between press freedom and individual reputation tilts more toward the latter than in the United States.

The development of Japanese society is greatly responsible for this difference. Unlike the expansionist spirit that marked the development of U.S. society, Japanese culture developed within strictly defined boundaries. The island nation's physical isolation from the rest of Asia forced the Japanese to promote group survival over personal aspirations. This insulation and group reliance, in turn, helped create a society that was homogenous in its ideas[55] and meticulous in its actions.[56]

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49. Anderson, *supra* note 22, at 524.

50. *See supra* notes 14–16 and accompanying text.

51. *See supra* notes 36–44 and accompanying text.

52. Masao Horibe, *Press Law in Japan*, *in* PRESS LAW, *supra* note 2, at 315, 327.

53. *See* MINPŌ [Civil Code] arts. 709, 710 (Japan), *translated in* BEER, *supra* note 10, at 319.

54. *See* Horibe, *supra* note 52, at 334.

55. Yosiyuki Noda, *Nihon-Jin No Seikaaku To Sono Ho-Kannen* [*The Character of the Japanese People and Their Conception of Law*], *excerpted and translated in* JAPANESE LEGAL SYSTEM, *supra* note 7, at 296.

56. *See* ISAIAH BEN-DASAN, THE JAPANESE AND THE JEWS (R.L. Gage trans., 1972), *excerpted in* JAPANESE LEGAL SYSTEM, *supra* note 7, at 288.

Japan's national passion for discipline and exactitude is rooted in the nation's strategic approach to agriculture.[57] Rice is a main staple in the Japanese diet, and for centuries the Japanese economy — like that of most other nations — was primarily agrarian.[58] Before trade routes developed, Japan was forced to rely upon its farmers to produce virtually all of the rice necessary to feed its people. In order to ensure an adequate harvest, Japanese farmers relied scrupulously upon a nationally proscribed schedule for food production.[59] That is to say, during much of its history, most Japanese people were engaged in the same activities at the same time.[60]

These conditions helped create a cultural greenhouse that fostered the growth of a natural homogeneity of thinking.[61] According to the Japanese scholar Yosiyuki Noda, "the Japanese take it for granted, almost unconsciously, that the people around them see things in the same light or have the same view as they do."[62] The expectation that everyone shares similar attitudes and beliefs manifests itself in what Noda describes as the Japanese tendency to accept unproven assertions as self-evident.[63] In other words, when everyone believes the same sorts of things, it is unnecessary to explain or prove that which society as a whole already understands. Consequently, "what others think" becomes synonymous with societally correct behavior,[64] and the importance of national consensus discourages nonconforming attitudes and positions.

Japanese libel laws reflect this cultural tendency toward conformity. As Professor Beer notes, the conflict between press freedom and Japan's traditional group-oriented culture can both enhance and diminish the rights of individuals. While the law's emphasis may center on restoring the defamed person's position in society, Japanese cultural tradition arguably views good name and privacy more in terms of group interac-

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57. JAPANESE LEGAL SYSTEM, *supra* note 7, at 287.

58. During the Middle Ages, 85% of Japan's population was engaged in farming activities. *Id.* at 288.

59. *Id.*

60. *Id.*

61. Noda, *supra* note 55, at 296.

62. *Id.*

63. *Id.* Noda writes:

> We often hear people say that such and such a thing is self-evident, suggesting that it is acceptable without the necessity of proof . . . . So unquestioningly, in fact, do we Japanese accept things as self-evident that we understand (at least we believe we understand) practically everything without any explanation or proof.

Id.

64. *Id.* at 297.

tion than in terms of the individual's rights as a member of that society.[65] Thus, the "right" of a national readership of aggressive, and occasionally overzealous, reporting is protected to a high degree,[66] just as it is in the United States. The difference, however, between the U.S. and Japanese approaches is found in the methods the Japanese courts use to correct the harm done to individuals by libelous reporting.

Article XXI of the Japanese Constitution outlines broad press protection similar to that found in the U.S. First Amendment.[67] Because Japan operates under a civil law system,[68] defamation and libel also receive detailed attention under both the Japanese Civil and Criminal Codes.[69] The Japanese system theoretically prefers civil libel suits over criminal prosecutions except in extreme cases.[70] In reality, however, injured parties resort more often to criminal prosecution, perhaps because the costs of civil litigation are much higher, and the civil damages awarded are usually nominal. Moreover, "the injured party is usually more interested in prompt vindication than in monetary compensation,"[71] and such vindication comes more swiftly when pursuing a remedy under the criminal system. As discussed below, although the American libel plaintiff often has similar motives, the U.S. court system arguably lacks the means to correct the falsehood promptly.[72]

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65. BEER, *supra* note 10, at 318.

66. *Id.*

67. KENPŌ [Constitution] art. XXI (Japan), *translated in* CONSTITUTIONS, *supra* note 12. The similarity between the U.S. and Japanese constitutions is not surprising. Members of General Douglas MacArthur's staff drafted Japan's modern constitution during the Allied Occupation after World War II. Ukai, *supra* note 1, at 115.

68. THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961–70, at 8 (Hiroshi Itoh & Lawrence W. Beer eds., 1978) [hereinafter CONSTITUTIONAL CASE LAW]. Japan's pre-1945 constitution and laws were heavily influenced by the French and German legal traditions. The country's present judicial system was designed by U.S. and Japanese Occupation agencies after World War II. *Id.* For an explanation of the importance between civil law-common law distinctions, see generally JOHN MERRYMAN, THE CIVIL LAW TRADITION (2d ed. 1985).

69. Although once common in the United States, *Sullivan's* constitutionalization of libel law essentially ended U.S. criminal libel prosecutions. Shortly after deciding *Sullivan*, the Supreme Court voided a Louisiana criminal statute on its face in Garrison v. Louisiana, 379 U.S. 64 (1964). The Court noted:

> Changing mores and the virtual disappearance of criminal libel prosecutions lend support to the observation that ". . . under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation."

Id. at 69 (citation omitted).

70. Lawrence W. Beer, *Defamation, Privacy, and Freedom of Expression in Japan*, 5 LAW IN JAPAN 192 (1972).

71. *Id.*

72. *See infra* notes 143–56 and accompanying text.

1. Defamation Under the Japanese Criminal Code

While criminal libel prosecution is discretionary in Japan, the libeled party may ask the prosecution to indict the alleged defamer.[73] Allegations of criminal defamation, including non-media cases, comprise approximately three percent of all criminal cases investigated, resulting in approximately twenty convictions per year.[74] In general, the conviction rate is much lower than for other crimes. Imprisonment is infrequent, fines are generally low, and suspended sentences are often employed.[75]

Unlike the negligence and actual malice standards applied in the United States, the Japanese Criminal Code holds the defamer strictly liable for the defamation, regardless of the circumstances.[76] Under article 230, paragraph 1:

> A person who injures the reputation of another by publicly alleging facts shall, *regardless of whether such facts are true or not*, be punished by imprisonment with or without forced labor for not more than three years or by a fine of not more than one thousand yen.[77]

Despite this seemingly harsh edict, the Criminal Code further distinguishes between ordinary defamation and defamation involving the public interest. In public interest cases, courts have imposed a negligence standard, rather than strict liability. This distinction, however, does not diminish the force of the statute in cases involving private plaintiffs, where truth is never an adequate defense.

Under article 230.2, the press can raise truth as a defense to libel allegations "[w]hen the statement . . . relates to matters of public concern and has been made solely for the purpose of promoting the public interest . . . ."[78] A 1969 decision harmonized the Criminal Code with the guarantee of legitimate speech under Article XXI of the Constitution. It held that the press could avoid punishment for defamation on a showing that it had a reasonable, albeit mistaken, belief that the statements were

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73. Horibe, *supra* note 52, at 328.

74. Beer, *supra* note 70, at 193.

75. *Id.*

76. Horibe, *supra* note 52, at 328.

77. KEIHŌ [Penal Code] art. 230, para. 1 (Japan), *translated in* Horibe, *supra* note 52, at 328 (emphasis added). "The Act for Temporary Measures Concerning Fines, Etc., Law No. 251 of 1948, raised the fine to 200,000 yen." *Id.* at 337 n.58.

78. KEIHŌ [Penal Code] art. 230.2, para. 1 (Japan), *translated in* Horibe, *supra* note 52, at 328. Information about criminal acts, public servants, or candidates for public office are considered *per se* to be a matter of public interest. *Id.* paras. 2, 3, *translated in* Horibe, *supra* note 52, at 328.

true, in light of the surrounding circumstances.[79] In other words, the courts will not impute criminal intent, and therefore will not find criminal liability, if the media defendant can prove that it believed the libelous statements regarding public matters were true,[80] and has made a good faith effort to ensure they were in fact true.

The Criminal Code defines "matters in the public interest" to include details surrounding the acts of accused criminals, and statements concerning public employees or candidates for public office.[81] In form, this approach differs from the U.S. courts' approach to libel, which focuses more on the public nature of the *identity* of the defamed individual, rather than the *subject* of the defamatory remarks.[82] In practice, however, this distinction has not led to substantially different results. For instance, the Japanese press, like its U.S. counterpart, has been unable to convince the courts that the very fact of publication creates a presumption that the reported matter is of public concern.[83] Instead, the Japanese courts have adopted an approach similar to that take by the U.S. Supreme Court in *Gertz*,[84] by holding that some private behavior of a private person can be of public concern, depending on the nature and potential influence of the person's private activities.[85] As discussed previously, the *Gertz* Court similarly held that a public figure may not always qualify as such, depending on the nature of the particular activity and the circumstances that led to the person's classification as a public figure.[86]

Despite the constitutional provision banning censorship,[87] Japanese

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79. Judgment of June 25, 1969 (Kochi v. Japan), Saikōsai [Supreme Court], 23 Keishū 7, at 259 (Japan), *translated in* CONSTITUTIONAL CASE LAW, *supra* note 68, at 175, 177.

80. *Id.* at 259, *translated in* CONSTITUTIONAL CASE LAW, *supra* note 68, at 177. *See also* Horibe, *supra* note 52, at 329.

81. KEIHŌ [Penal Code] art. 230.2 paras. 2, 3 (Japan), *translated in* Horibe, *supra* note 52, at 328.

82. *See supra* notes 17–33 and accompanying text.

83. In 1953 the Tokyo High Court held that a magazine article reporting a rumor that several media executives had been bribed to keep certain criminal scandals secret did not address a matter of public concern. Judgment of Feb. 21, 1953, Kōsai [High Court], 6 Kōsai Keishū 367 (Japan), *cited in* Horibe, *supra* note 52, at 329.

84. In *Gertz*, the Court held that a public official is not necessarily a public official in all aspects of his life. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 351–52 (1974). *See supra* notes 29–31 and accompanying text.

85. The First Petty Bench of the Japanese Supreme Court developed this test in a judgment involving an article published in 1976 in the monthly magazine, *Gekkan Pen*, which charged the president of a Buddhist lay organization with engaging in intimate relations with two female members. Judgment of Apr. 16, 1981, Saikōsai [Supreme Court], 1000 HANJI 25 (Japan), *cited in* Horibe, *supra* note 52, at 329.

86. *Gertz*, 318 U.S. at 345–46.

87. KENPŌ [Constitution] art. XXI (Japan), *translated in* CONSTITUTIONS, *supra* note 12.

courts have exercised prior restraint under the Criminal Code in at least one instance by enjoining publication of an allegedly defamatory magazine article questioning the qualifications of a Hokkaido gubernatorial candidate and former Socialist Dietman.[88] To protect his good name, the politician, Igarashi Kozo, sought a court injunction blocking publication of the piece in the monthly *Hoppo Janaru.* The Sapporo District court and High Court agreed and granted the injunction. The Supreme Court upheld the decision holding that, in some cases, a ban on publication was justified when the "damage to good name could be serious and that restoration of reputation would be difficult if not impossible."[89] The Court refused to find that such an injunction constituted censorship "because it was the result of the court's examination of an individual case filed by the concerned party."[90] The Court also found that freedom of speech "is more likely to be abused through the use of prior restraint" of publication, and held that such measures will be allowed only in narrow circumstances.[91] In this respect, Japanese criminal libel jurisprudence differs greatly from U.S. libel law. Prior restraints are especially disfavored under the U.S. First Amendment,[92] and are not considered a permissible means for curbing potential libel.[93]

2. Defamation Under the Japanese Civil Code

The Japanese Civil Code views defamation as an unlawful tort. Under article 723, courts may require a party who injured another's reputation "to take suitable measures for the restoration of the latter's reputation either in lieu of or together with compensation for damages."[94] Compensation, which is more completely defined in articles 709 and 710, is the designated remedy for both intentional and negligent defamation,

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88. ARTICLE 19 REPORT, *supra* note 8, at 11; BEER, *supra* note 10, at 324–25.

89. ARTICLE 19 REPORT, *supra* note 8, at 11; BEER, *supra* note 10, at 325.

90. ARTICLE 19 REPORT, *supra* note 8, at 11.

91. *Id.*

92. *See* Aviam Soifer, *Freedom of the Press in the United States, in* PRESS LAW, *supra* note 2, at 97. See also Near v. Minnesota, 283 U.S. 697 (1931), which struck down a Minnesota statute that permitted injunctions against the publication of "malicious, scandalous and defamatory" newspapers and periodicals. In reaching its decision, the court noted:

> The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed [under the First Amendment]. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints on publication.

Id. at 713.

93. *Near*, 283 U.S. at 713.

94. MINPŌ [Civil Code] art. 723 (Japan), *translated in* Horibe, *supra* note 52, at 330.

and can include non-pecuniary damages.[95] In the spirit of article 723, courts often require the offending party to publicly apologize in a local or national newspaper.[96] Such an apology does not necessarily imply an admission of libel, and is frequently used in out-of-court settlements.[97] In this respect, the apology is not unlike the U.S. media's sporadic practice of publishing corrections in an attempt to breed good will and ward off potential litigation.[98] In the United States, however, such corrections — when they do occur — are voluntary and often appear within days of the original publication.

Unlike the Japanese Criminal Code, the Civil Code does not have a provision absolving liability for defamation involving issues of the public interest. In 1958, however, the Tokyo district court applied the public interest principle to a civil suit involving libel charges brought against the *Yomiuri Shinbun* by an unsuccessful Diet candidate.[99] The decision was later upheld by the First Petty Bench of the Supreme Court.[100] It held that even if the article was not entirely accurate, the newspaper had avoided illegality because its reporters and editors had sufficient grounds for believing the veracity of the information. Although the newspaper's information was based on inaccurate police records, the Court found that it had not engaged in journalistic negligence.[101] In dicta, the district court found that some private matters completely unrelated to the people's

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95. The damage provisions, articles 709 and 710, further require:

Article 709.

A person who violates intentionally or negligently the right of another is bound to make compensation for damage arising therefrom.

Article 710.

A person who is liable in compensation for damages in accordance with the provisions of the preceding Article shall make compensation therefore even in respect of a non-pecuniary damage, irrespective of whether such injury was to the person, liberty or reputation of another or to his property rights.

MINPŌ [Civil Code] arts. 709, 710 (Japan), *translated in* BEER, *supra* note 10, at 319.

96. Other defamation remedies include: publication in a newspaper of a judgment against the defendant in a civil suit, at the defendant's expense; publication of a judgment that found the defendant guilty of criminal defamation; and retraction of the defamatory statement. *See* Judgment of July 4, 1956 (Ōkuri v. Kageyama) Saikōsai [Supreme Court], 10 Minshū 785 (Japan) (Irie, J., concurring), *translated in* JAPANESE LEGAL SYSTEM, *supra* note 7, at 320, 326.

97. Judgment of July 4, 1956, 10 Minshū 785 (Tanaka, C.J., concurring), *translated in* JAPANESE LEGAL SYSTEM, *supra* note 7, at 320, 324; Horibe, *supra* note 52, at 330.

98. *See* Bill Carter, *G.M. Suspends Ads on NBC News Despite Apology for Truck Report*, N.Y. TIMES, Feb. 11, 1993, at A1; *see also infra* notes 150–51 and accompanying text.

99. Judgment of Dec. 24, 1958, Chisai [District Court], 20 Minshū 1125 (1966) (Japan), *cited in* BEER, *supra* note 10, at 320–21 (involving media allegations that an unsuccessful Diet candidate was of Korean parentage, had been convicted of murder several years earlier, and had given a distorted impression of his academic credentials in campaign literature).

100. Judgment of June 23, 1966, Saikōsai [Supreme Court], 20 Minshū 1118 (Japan), *cited in* BEER, *supra* note 10, at 321.

101. *Id.* at 321.

judgment of a candidate's suitability should not be published against his will. As in the United States,[102] precisely defining what constitutes "completely unrelated" to voter judgment has proven problematic.[103] Subsequent cases further refined the Japanese public interest test to include three conditions. The media defendant must be able to prove that: (1) the matter reported was of public interest;[104] (2) the information was reported with the purpose of benefiting the public good; and (3) the reported information was true, or the defendant had a good reason to believe that it was true.[105]

II. PROMOTING PRESS FREEDOM V. PROTECTING INDIVIDUAL INTERESTS

The key difference between the U.S. and Japanese approaches to libel law is that the United States focuses on enhancing society through robust reporting, while Japan pays greater attention to restoring the reputations of defamed individuals. U.S. libel law promotes reporters' need to operate with few restraints through the "actual malice" standard, and

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102. *See* Monitor Patriot Co. v. Roy, 401 U.S. 265, 275 (1971) ("Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks.").

103. BEER, *supra* note 10, at 321.

104. The First Petty Bench of the Supreme Court determined that "matters of public concern" might include the private behavior of a private person, depending on the nature of the person's social activities and the degree to which he or she influenced society through those activities. Judgment of Apr. 16, 1981, 1000 HANJI 25, *discussed in* Horibe, *supra* note 52, at 329. The case arose after the *Gekkan Pen* magazine published articles in 1976 alleging that the president of a large Buddhist lay organization had engaged in sexual relations with two female members of the organization. The magazine editor was arrested and received a ten month suspended sentence from the Tokyo District Court. *Id.* Note the similarity between the Japanese Court's analysis of "matters of public concern" with the U.S. Supreme Court's discussion of public figures in *Gertz*. *See Gertz*, 418 U.S. at 345–46.

105. The courts take a rather rigid approach toward the requirement that the press prove it believed the truthfulness of the information. In 1989, *Time* magazine was ordered to pay a Japanese gynecologist 300,000 yen for having distorted her opinion in a 1983 article about Japanese women. The statement, which suggested the doctor believed abortions are so common in Japan that "it is like having a tooth out," was taken from a Kyodo news service report published the year before. The Tokyo District Court found that *Time* had changed the meaning of the Kyodo report by dropping the words "this suggests for some people" from the beginning of the quote, making the doctor appear flippant about the subject of abortion. The court said that because *Time* had not interviewed the doctor for its story, and thus could not have verified the statement's accuracy, the magazine should have used the statement without naming the source and with the introductory clause "it is said." Judgment of Nov. 17, 1989, Chisai [District Court] (Japan) (English summary on file with *Michigan Journal of International Law*); *see also U.S. Magazine Ordered to Pay Damages to Japanese Doctor*, JAPAN ECONOMIC NEWSWIRE, Nov. 17, 1989, *available in* LEXIS, Nexis Library, Wires File. It is noteworthy, however, that the court ordered only 300,000 yen (approximately $1,300) in damages; the doctor had sought 60 million yen (approximately $260,000) and a public apology. *Time Publishing House Sued*, JAPAN ECONOMIC NEWSWIRE, Mar. 3, 1984, *available in* LEXIS, Nexis Library, Wires File.

privatizes the costs of inaccurate and defamatory reporting.[106] Japanese libel law, in contrast, supports aggressive reporting to a slightly lesser degree. The Japanese courts require the press to demonstrate a good-faith basis for believing the truth of the disputed statement, and emphasize remedies that correct the falsehood and restore the injured individual's good reputation.[107] As a means of advancing both goals, the Japanese system is arguably superior.

A. *The Media's Ability to Report the News*

Despite the courts' differing modes of analysis in the United States and Japan, little evidence suggests that one nation's media endures greater restrictions than the other. An American journalist would likely argue that the U.S. "actual malice" standard, which is applied in libel cases concerning public officials and public figures, protects the media more than the Japanese standard, which requires the defendant to prove it believed the truth of the alleged libel. However, this argument is simplistic and does not account for various factors which impact any possible chilling effect that libel litigation has on the media.

The phrase "libel chill" describes the vague fear that libel litigation curbs journalists' zeal for reporting. The existence of libel chill is widely accepted in the United States.[108] However, the threat encompasses far more than is suggested by the analytical approach employed by courts in libel suits. Attorneys' fees, libel insurance premiums, and the cost of defending a suit may contribute more to the elusive chilling effect than the fear of losing.

Although the threat of libel chill was widely discussed in U.S. journalism trade publications[109] in the wake of a 1979 U.S. Supreme Court decision that allowed discovery into newsroom editorial decisionmaking,[110] there is little evidence to suggest that the U.S. press has foregone certain types of news coverage because of the perceived threat of a potential libel suit.[111] Nor can media executives agree whether

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106. *See* discussion *supra* part I.A.

107. *See* discussion *supra* part I.B.

108. *See, e.g.*, *Sullivan*, 376 U.S. at 279 ("A rule compelling the critic of official conduct to guarantee the truth of all of his factual assertions — and to do so on pain of libel judgments virtually unlimited in amount — leads to . . . 'self-censorship.'").

109. *See, e.g.*, Michael Massing, *The Libel Chill: How Cold Is It out There?*, COLUM. JOURNALISM REV., May–June 1985, at 35; David Zucchino, *Publish and Perish: Libel and the Little Publication*, WASH. JOURNALISM REV., July 1985, at 28.

110. Herbert v. Lando, 441 U.S. 153 (1979).

111. The effects of libel chill in the newsroom have been hotly debated. For examples of the widely diverging opinions on the issue, see James Bow & Ben Silver, *Effects of* Herbert

libel litigation has actually reduced news coverage of controversial subjects.[112] Those who believe in libel chill point to the infamous example of the *Alton Telegraph*, an Illinois newspaper with a 38,000 circulation that was forced to forego appeal[113] and file for bankruptcy in the wake of a $9.2 million libel judgment.[114] The *Telegraph* is still publishing, but has ceased much of its investigative reporting.[115] At the same time, however, executives at some larger news organizations report that their investigative coverage continues as usual,[116] and newspapers continue to publish investigative pieces.

Still, the perception of libel chill remains. The availability of compensatory and punitive damages has encouraged public-figure plaintiffs to seek millions of dollars in recovery,[117] and multi-million dollar jury verdicts have contributed greatly to the perceived chilling effect. Between 1989 and 1990, the average verdict in public-figure

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v. Lando *on Small Newspapers and TV Stations*, 61 JOURNALISM Q. 414, 415 (1984) (nearly 61% of 312 newspaper managing editors and television producers surveyed in 1980 felt a controversial libel ruling had no effect on their ability to gather news). *But see* Richard E. Labunski & John V. Pavlik, *The Legal Environment of Investigative Reporters: A Pilot Study*, 6 NEWSPAPER RES. J. 13, 15 (1985) (1983 survey of 80 members of a select journalism organization, Investigative Reporters and Editors, Inc., revealed that 65% felt that because of recent libel judgments, stories were "not being covered that ought to be covered"); *see also* David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CAL. L. REV. 847, 860 (1986) (citing statements from publishers about decisions to withhold controversial news stories for fear of libel suits).

112. *See* William A. Henry III, *Jousts Without Winners: After a Flurry of Major Libel Cases, No One Has Much to Crow About*, TIME, July 6, 1987, at 69, quoting media executives:

> "We are no less aggressive," says Editor John Driscoll of the *Boston Globe*, which has faced libel suits from three recent gubernatorial hopefuls. CBS News Correspondent Mike Wallace, the on-camera reporter for the documentary that resulted in a suit by General William Westmoreland, says, "I don't think that has chilled us for one instant as far as undertaking tough investigative stories is concerned."

However others disagree. "*San Francisco Examiner* executive editor Larry Kramer, whose paper recently won a reversal of a $4.5 million libel judgment, concedes, 'That lawsuit had a very chilling effect on this newspaper.' In particular, he said, editors are far more cautious about even sending reporters out to cover 'borderline' stories." *Id.*

See also Martin Garbus, *New Challenges to Press Freedom*, N.Y. TIMES, Jan. 29, 1984, §6 (Magazine), at 34. Garbus, a New York media attorney writes: "Press spokesmen routinely deny that they kill articles because of the risk of libel, but the chilling effect is well known to lawyers who work with the media. . . . More and more, I see unflattering adjectives removed, incisive analyses of people and events watered down, risky projects dropped." *Id.* at 48.

113. Libel experts predicted the verdict would have been overturned on appeal, but the *Alton Telegraph* did not have the resources needed to pay for an appeals bond. *See* Bill Bauer, *Media Liability Coverage; Underwriting Update*, 90 BEST'S REV. 62 (March 1990).

114. Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 12 (1983). The *Alton Telegraph* eventually reached a $1.4 million settlement in the case through chapter 11 reorganization in bankruptcy court. *Id.* at 13 n.73.

115. *See* Massing, *supra* note 109, at 33.

116. *See* Henry, *supra* note 112 and sources cited *supra* note 111.

117. Anderson, *supra* note 22, at 514.

defamation cases exceeded $4 million, a figure ten times greater than the average verdict of $432,000 awarded between 1987 and 1988.[118] One study found that average libel verdicts are approximately three times greater than average verdicts in medical malpractice and product liability cases.[119]

Despite the fear of losing a libel suit, however, the fact remains that even though a large proportion of libel plaintiffs win at the jury level, most media defendants win on appeal, especially if the case involves a public-official or public-figure plaintiff.[120] Even when libel verdicts are affirmed, courts often reduce large damage awards.[121] Nevertheless, libel litigation in the United States exacts its toll. The largest affirmed libel verdict to date totals just over three million dollars.[122] The time and energy spent in defending a libel suit can be enormous,[123] and libel insurance rates have skyrocketed.[124] Furthermore, the costs of defending a libel suit, even where the media prevails or settles out of court, can be

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118. Alex S. Jones, *News Media's Libel Costs Rising, Study Says*, N.Y. TIMES, Sept. 26, 1991, at A28.

119. *See* Henry R. Kaufman, *Trends in Damage Awards, Insurance Premiums and the Cost of Media Libel Litigation*, *in* THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS 1, 5 (Everette E. Dennis & Eli M. Noam eds., 1989) [hereinafter COST OF LIBEL].

120. BEZANSON et. al., *supra* note 10, at 142–43. In a study of libel cases conducted between 1974 and 1984, Iowa researchers found that plaintiffs won at trial 61% of the time; appeals were taken in 91% of the tried cases, and the media defendant prevailed in 67% of the post-trial appeals. *Id.* *See also* Goodale, *supra* note 35, at 84 (citing statistics showing the media's appellate success rate at 67% in 1982, 68% in 1984, and 60% in 1985).

121. *See, e.g.*, Burnett v. National Enquirer, Inc., 193 Cal. Rptr. 206 (Cal. Ct. App. 1983). Actress Carol Burnett won a $1.6 million verdict from the jury in her $10 million libel action against the *National Enquirer*. The trial court initially reduced the award to $800,000 on remittitur. Burnett v. National Enquirer, Inc., 7 Media L. Rep. (BNA) 1321 (Cal. Super. Ct. L.A. County, May 13, 1981). On appeal, the total damage figure was reduced to $200,000. *Burnett*, 193 Cal. Rptr. at 206. Verdicts upheld on appeal tend to range in amount from $30,000 to $350,000. *See LDRC Damages Watch: New Developments in 27 Cases — Five More Million-Dollar Awards but Some Greater Success at Trial and Continued Success on Appeal*, LDRC BULL., Winter 1983–84, at 17.

122. *See* Brown v. Jacobson, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988) ($3,050,000 in total actual and punitive damages in a public-figure corporation libel suit). The Iowa study revealed that media defendants appeal 91% of unfavorable verdicts. BEZANSON et. al., *supra* note 10, at 142–43.

123. Barrett, *supra* note 111, at 858.

124. Since 1984 "most individual media companies have experienced a 200 percent to 300 percent increase in their insurance premiums . . . ." Kaufman, *supra* note 119, at 13. Defense costs make up 85% of payments under most media insurance policies, and are typically included in liability limits. Deductibles, which are also included in those limits, range from $5,000 to $500,000 or more per incident, depending on the size of the account and the loss history. Bauer, *supra* note 113. According to Kaufman, who works at the Libel Defense Resource Center, a New York-based media clearinghouse on libel matters, the cost and availability of insurance "could have a greater impact on how libel cases are defended than any substantive ruling by the Supreme Court." Kaufman, *supra* note 119, at 14.

staggering.[125]

In short, the cost of defending a potential libel suit may have a greater chilling effect in the United States than the outcome of any particular litigated case. When viewed from this perspective, the United States' superficially more media-friendly standard may not provide the U.S. press corps with any more protection than their Japanese colleagues enjoy, even though the U.S. standard absolves journalists of liability when public-official or public-figure plaintiffs are unable to prove actual malice. Although plaintiffs carry the lion's share of the burden of proof, the U.S. press is subjected to far more libel suits.[126]

In some respects, however, the U.S. press does enjoy more autonomy than its Japanese counterpart. Because U.S. culture is far more fragmented and diverse than that of Japan, the American media, especially the big-city press, arguably feels fewer societal constraints than the Japanese press.[127] However, the restrictions felt by the Japanese may be attributed to the media itself. Although the Japanese press remains independent of the government, it engages in self-censorship[128] far more often than its U.S. counterpart.

The Japanese media generally considers the following three subjects taboo: criticism of the royal family, exposure of the relationship between organized crime and politicians, and sensitive matters, such as the treatment of minorities in Japanese society.[129] It is not uncommon for

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125. The average cost of defending a typical libel suit is approximately $150,000, but a protracted suit can run costs into the millions. Kaufman, *supra* note 119, at 14. In 1985 *Time* magazine spent an estimated $1.5 million to defend libel charges brought by Israeli General Ariel Sharon, and CBS spent between $6 million and $10 million to settle charges brought by General Westmoreland after a 60 Minutes interview. Michael Massing, *Libel Insurance: Scrambling for Coverage*, COLUM. JOURNALISM REV., Jan.–Feb. 1986, at 36. General Sharon lost when *Time* was found guilty of defamation and falsity, but not actual malice. Arnold H. Lubasch, *Time Cleared of Libeling Sharon but Jurors Criticize Its Reporting*, N.Y. TIMES, Jan. 25, 1985, at A1.

126. Between 1974 and 1984, 536 libel cases were brought against media defendants in the United States. BEZANSON et al., *supra* note 10, at 96–97. Although corresponding figures are not available for Japan, between 1950 and 1968, only "38 lower court decisions involving criminal and civil defamation by the mass media were reported" in that country. Between 1965 and 1970, the Japanese Civil Liberties Bureau, an administrative agency, handled 128 defamation cases involving the mass media. The Bureau determined there had been a "substantial violation of personal rights" in 41 of the 128 cases. None of these were litigated in court. BEER, *supra* note 10, at 315–16.

127. It is not unusual in U.S. newsrooms for an editor to ask the newspaper's attorney to read particularly sensitive stories before they appear in print as a measure for warding off potential libel suits. Conversely, it would be unlikely for that same editor to call in an outside party to determine whether a particular story or method of reporting would offend readers' sensibilities.

128. ARTICLE 19 REPORT, *supra* note 8, at 18.

129. *Id.* A 1973 survey of 1,900 Japanese journalists found that approximately 30% felt there were particular topics about which they could not write, including minority discrimination,

Japanese editors to agree to government-requested news blackouts, such as the blackout adopted in February 1992 regarding Crown Prince Naruhito's search for a bride.[130] Much to the chagrin of the Japanese press, the blackout ended in early January 1993 after a foreign newspaper broke the poorly kept secret of the crown prince's impending engagement to Masako Owada. The embarrassment caused by the scoop has led Japanese publishers to question whether such self-imposed cooperation with the government should continue.[131]

Such self-censorship by the Japanese media should not be confused with the chilling effect purportedly caused by libel litigation. The Japanese Newspaper Publisher and Editors Association's decision to embargo coverage of the royal courtship did not stem from the fear that such coverage would subject it to lawsuits. Instead, it was simply trying to act like a good corporate citizen by granting a temporary news blackout where excessive media attention might have hampered the crown prince's ability to find a bride.[132]

Furthermore, evidence suggests that the Japanese media faces little chilling effect, despite its stiffer burden of proof in defending libel suits. Sensationalist weekly publications enjoy wide circulation in Japan,[133] just as they do in the United States. Few libel suits are filed in Japan[134] and the awards are generally very low by U.S. standards.[135] This is true, in part, because societal controls are generally viewed in Japan as being more powerful than legal controls.[136] Although at least one study revealed that many Japanese public figures consider themselves wronged

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certain political parties, religious groups, criticism of other newspapers, and sex. *See* Akihiko Haruhara, *Current Attitudes of Newspaper Journalists in Japan*, NEWSPAPER RES. Oct. 1973, at 8, *abstracted and translated in* JAPANESE COMMUNICATION STUDIES OF THE 1970S, at 139–42 (Yamanaka et al. eds., 1986) [hereinafter JAPANESE COMMUNICATION].

130. *The Right to Know v. the Right of Privacy; Media Wariness Has Increased; Future Cooperation Not Likely*, THE NIKKEI WEEKLY, Feb. 15, 1993, *available and translated in* LEXIS, Nexis Library, Omni File.

131. *Id.*

132. *See id.*

133. *See* John Burgess, *In Japan, the Inside Snoop; Photo Magazines Traffic in Sex and Carnage*, WASH. POST, Dec. 8, 1986, at D1; Geoffrey Murray, *Lurid News Coverage is Raising Issue of Right to Privacy in Japan*, CHRISTIAN SCI. MON., June 29, 1984, at 9; Steven R. Weisman, *Japan's Weeklies: School for Scandal with a Curriculum Including Politics*, N.Y. TIMES, Aug. 17, 1989, at A14.

134. *See* sources cited *supra* note 126.

135. Monetary damages for defamation in Japan have rarely, if ever, exceeded 1.5 million yen (approximately $7,500). *See* Horibe, *supra* note 52, at 330. The largest libel award upheld to date in a U.S. media case was $3,050,000, in an action involving a public-figure corporation plaintiff. *See* Brown v. Jacobson, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988).

136. CONSTITUTIONAL CASE LAW, *supra* note 68, at 20.

by the media, especially newspapers and pulp magazines, few have actually sued for defamation.[137] A cultural bias against troubling others with personal problems and a general unwillingness to challenge a semipublic authority may account for this reluctance to sue the media.[138] Thus, although the media defendant's burden of proof is greater under Japanese libel law, cultural norms protect press autonomy by decreasing the incidence of libel suits and lowering damage awards.

B. *The Efficacy of the Remedies*

The greatest difference between Japanese and U.S. libel laws may be the remedies provided by each system. In this respect, Japanese law seems more able to meet societal needs. As discussed previously, in the United States the costs of defamation are viewed as essentially private,[139] and are remedied through damage awards. The courts have resolved this tradeoff between personal interaction in society and the public's "right to know" in favor of the media's need to operate with few restraints in the "marketplace-of-ideas."[140] In Japan, the law focuses more on restoring the individual's reputation in society by correcting the falsity of the offending statement,[141] an objective underemphasized by the U.S. system.[142]

According to a recent study conducted at the University of Iowa, the chief reasons U.S. plaintiffs cited for bringing libel suits included

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137. BEER, *supra* note 10, at 316.

138. *Id.* at 317.

139. *See supra* notes 34–36 and accompanying text.

140. The continuing validity of the marketplace-of-ideas concept is called into question by the fact that 14 newspapers have folded or merged since January 1992. Only 33 U.S. cities have competing daily newspapers under separate ownership. *See* John Schmeltzer, *Iowa Towns Deliver Twice the News*, CHI. TRIB., Apr. 1, 1993 (Business), at 1.

141. *See* LAW AND SOCIETY IN CONTEMPORARY JAPAN: AMERICAN PERSPECTIVES 2 (John O. Haley ed., 1988) [hereinafter LAW AND SOCIETY]. As Haley notes:

> Correction rather than punishment or retribution is the principal aim of the Japanese criminal justice system at all levels. Confession, repentance, and absolution are the essential elements. . . . In order to achieve this aim, the authorities respond to an offender's acknowledgment of guilt and expression of remorse, which includes compensation of the victim, with absolution as a gesture of benevolence.

Id.

Although Haley's remarks address only criminal prosecution, they aptly describe both criminal and civil libel litigation in Japan. As will be discussed, Japanese libel litigation involving issues of public interest, focuses on the truth or falsity of the alleged defamation, with the public apology serving as the major remedy. In the United States, most libel litigation focuses on whether the plaintiff is a public figure, and which standard of care to impose on the media defendant. *See infra* notes 157–67 and accompanying text.

142. *See* Anderson, *supra* note 22, at 524–26. Anderson argues, "[i]t is probably safe to say that no major legal system in the world provides as little protection for reputation as the United States now provides." *Id.* at 525–26.

vindication of their reputation, deterrence of future republication, and punishment of the media outlet for publishing the alleged defamation. Financial recovery was cited as a goal in less than one-fourth of the cases.[143] When asked what they found most upsetting about the alleged libel, most U.S. plaintiffs claimed that the defamatory statement was false, and that they had suffered emotional, personal, business, and — in some cases — political harm as the result of the publication.[144] Significantly, most said they would have been satisfied with a correction or retraction and might not have brought the suit had the media outlet complied with such a request.[145] But because reporters often react defensively to libel allegations, requests for correction are often ignored.[146] Thus, the number of libel suits brought in the United States may be partially attributed to a desire by plaintiffs to mitigate their injury through a public assertion of media falsehood.[147]

The Iowa study's findings were supported recently by NBC's unprecedented on-air apology to General Motors (GM) for tampering with a GM pickup truck to ensure that it would catch fire during a "Dateline NBC" report on a potential flaw in the truck's design. The automaker pulled all of its advertising from NBC news programs and threatened the network with a multimillion dollar defamation suit.[148] General Motors agreed to drop the suit in return for the apology and other concessions. Despite the threatened litigation, the automaker was clearly more concerned about correcting the error than the possibility of recovering damages. As one GM spokesman put it, "We needed to have our reputation restored . . . ."[149]

Despite evidence that libel plaintiffs sue primarily to restore their reputation and correct perceived falsity, libel litigation in the United

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143. *See* BEZANSON et al., *supra* note 10, at 79. Specifically, of 160 libel plaintiffs surveyed, 30% said they sued to restore their reputation; 29.4% said punishment and vengeance motivated their decision; 21.9% sued to recover money damages; and 18.7% said they sued to stop further publication. *Id.*

144. *Id.* at 27.

145. *Id.* Specifically, of 155 plaintiffs surveyed on this question, 71% stated they would have been satisfied with a correction, as opposed to 3.9% who stated that only money would repair the damage. Of the other responses: 1.9% would have been satisfied with an apology; 20% stated nothing would satisfy them; and 3.2% listed various other responses. *Id.* at 24.

146. The University of Iowa study found that nearly 78% of libel plaintiffs contacted the media before filing the lawsuit and requested a correction. The request was denied in 64.8% of the cases. *Id.* at 25–26. However, the Iowa study did not address whether the statements for which the corrections were sought were actually false.

147. As Bezanson notes, "[m]ost plaintiffs win by suing, they do not necessarily sue to win in court." *Id.* at 229.

148. Carter, *supra* note 98.

149. *Id.* at A21. The statement is attributed to William J. O'Neill, director of public affairs for General Motors' North American operations.

States under *Sullivan*'s marketplace-of-ideas analysis does little to address these problems.[150] Instead of focusing on the truth or falsity of a statement, libel litigation in the United States turns first on whether the plaintiff is a public official or public figure, and, if so, whether the statement was made with actual malice. Both questions go to the standard of care required of the media defendant and neither addresses the statement's truthfulness or the potential harm to the plaintiff.[151] When plaintiffs do prevail in libel litigation, the recovery often comes years after the defamation and in monetary form rather than repair of damaged reputation.[152] As the NBC example illustrates, it is possible that more plaintiffs would be willing to forego costly litigation if they could restore their reputation more quickly.

Perhaps more importantly, the current U.S. analysis does little to aid in determining the truth or falsity of the alleged defamation. Plaintiffs face little risk, if any, that the truth of the statement will be confirmed because so much of the litigation focuses on determining the proper standard for judging the media's behavior.[153] Arguably, the current mode of analysis applied in the United States constrains those whose interest is in revealing the truth and favors those who would benefit from its concealment.[154]

The Japanese mode of libel analysis is better in several respects at addressing reputational harm and discovering the truth or falsity of the alleged defamation. This may be due, in part, to the Japanese conceptualization of litigation less in the terms of victory or loss that characterize Western lawsuits, and more as a means for establishing "a harmonious situation with which both parties are neither satisfied or [sic] dissatisfied, where there is no loser or winner."[155] Correction, not retribution or punishment, forms the basis of the Japanese criminal justice system[156] and is arguably part of the civil adjudicatory system as well.

In contrast to its U.S. counterpart, Japanese libel litigation is marked

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150. *See* BEZANSON et al., *supra* note 10, at 105. According to the University of Iowa study, 87% of the libel actions brought against the media between 1974 and 1984 focused on issues involving plaintiff status and actual malice. Only 13% of the cases had truth or falsity as their primary focus, usually after the plaintiff had met the actual malice and status issues. *Id.* at 106–07.

151. *Id.* at 105.

152. *See* Anderson, *supra* note 22, at 510.

153. BEZANSON et al., *supra* note 10, at 229.

154. *Id.*

155. Noda, *supra* note 55, at 306.

156. LAW AND SOCIETY, *supra* note 141, at 2.

by the spirit of apology.[157] Damage awards tend to be extremely low by U.S. standards[158] and are often coupled with a mandatory public apology.[159] Although some question the effectiveness of the public apology in deterring future media wrongdoing,[160] much of Japanese society still considers public censure quite humiliating.[161] Japan's lack of a jury system[162] may partially explain the different damages provided by the U.S. and Japanese systems. Juries in U.S. libel actions tend to sympathize with plaintiffs, in part because they often do not understand the editorial process and are suspicious of many standard journalistic practices.[163]

Regardless, Japanese litigation, both in procedure and remedy, focuses more on restoring the injured individual to his or her place in society than on punishing the press through megaverdicts. As noted previously, both Japanese[164] and American[165] libel plaintiffs appear more interested in vindication than financial recovery. A court-ordered apology achieves this goal more effectively than awarding punitive damages.

Japanese libel analysis also addresses the truth or falsity of the statement more thoroughly than that of the United States, especially in matters involving public interest. The Japanese courts focus on whether or not the journalist believed the offending statement was true, not on whether the journalist acted with actual malice in determining whether the statement was false.[166] Because Japanese libel law is less concerned with a plaintiff's status as a public or private citizen, the courts need not examine the plaintiff's status or the defendant's actual malice, as is required under U.S. libel law. Instead, Japanese courts determine whether

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157. *See supra* note 37.

158. *See* sources cited *supra* note 135.

159. The Japanese criminal sentencing procedures take into account whether the defendant has repented for the crime and made efforts to pay damages. This practice arguably spills over into civil defamation suits as well. *See* Shigemitsu Dando, KEIHŌ KOYO: SORON [Elements of Penal Law: General Parts], 421–24, *excerpted and translated in* JAPANESE LEGAL SYSTEM, *supra* note 7, at 319–20.

160. BEER, *supra* note 10, at 315.

161. *Id.*; *see also* LAW AND SOCIETY, *supra* note 141, at 2. Haley argues: "This element of remorse in the Japanese legal process . . . is a recurring theme throughout Japanese social life. . . . [T]he apology . . . reinforces the authority of the group by giving the individual strong incentives to comply with the dictates of the group or to defer to those in authority within the group." *Id.*

162. CONSTITUTIONAL CASE LAW, *supra* note 68, at 10.

163. *See* Todd F. Simon, *Libel as Malpractice: News Media Ethics and the Standard of Care*, 53 FORDHAM L. REV. 449, 450–51 (1984).

164. *See supra* note 71 and accompanying text.

165. *See supra* note 145 and accompanying text.

166. *See supra* note 151 and accompanying text.

the matter in question involved the public interest. If so, truth is a defense for the media defendant, which will usually prevail by showing that it was not negligent in believing the statement was true.[167] Ascertaining whether the alleged defamation was true, therefore, becomes central to resolving the case.

U.S. actual malice analysis, on the other hand, does not examine truthfulness as much as it does the media defendant's motives in publishing the statement.[168] The media need not demonstrate truth as a defense in libel suits. Instead, public-official and public-figure plaintiffs must demonstrate that the reporter acted with reckless disregard for truth or falsity in publishing the alleged defamation. In short, the actual malice standard provides the media with a shield for publishing falsehoods, provided that the reporter was unaware of the falsehood at the time and did not bother to investigate.

Determining the truthfulness of the defamation, however, is not central to all Japanese libel litigation. The strict liability standard under the Criminal Code[169] for matters falling outside of the public interest does little to determine whether the statement was true. In such cases, the U.S. model is superior, because under the *Gertz* standard private figures need only show that the media acted negligently in publishing the defamatory statement.[170] However, actual malice analysis resurfaces even in private-figure libel litigation in the United States when the plaintiff seeks to recover punitive damages. This, in turn, skews the litigation away from determining whether the offending statement was in fact true,[171] and focuses attention on punishing the media rather than restoring the reputation of the injured plaintiff.

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167. The court weighs several factors when considering whether the media defendant was negligent in its belief that the statement was true, including: whether the journalist relied upon an official announcement; whether the journalist interviewed all of the relevant parties; and whether the journalist sought rebuttal from the person whose reputation could be damaged by the article. Tips from anonymous or confidential news sources are not considered sufficient. Professor Yoichiro Yamakawa, *Freedom of Speech and Press in U.S. and Japan*, lecture at the University of Michigan Law School (Oct. 20, 1992) (summary on file with the *Michigan Journal of International Law*); *see also* standard of care discussion in Judgment of June 25, 1969, 23 Keishū 7, 259, *translated in* CONSTITUTIONAL CASE LAW, *supra* note 68, at 177.

168. *See* BEZANSON et al., *supra* note 10, at 105.

169. KEIHŌ [Penal Code] art. 230.1 (Japan), *translated in* Horibe, *supra* note 52, at 328.

170. *See supra* notes 29–33 and accompanying text.

171. *See supra* notes 153–54 and accompanying text.

III. Incorporating Japanese Jurisprudence into U.S. Libel Analysis

The U.S. legal approach to handling libel litigation does not adequately address the societal harm caused by defamation and does little to address the truth or falsity of the alleged libel. Incorporating two aspects of Japanese libel jurisprudence into the U.S. analysis would remedy this problem to some extent.

First, the U.S. Supreme Court should consider retreating from the actual malice standard in defamation cases involving public officials and public figures in favor of the Japanese standard of requiring journalists to demonstrate a good faith belief in the truth of the alleged defamation. Modifying actual malice analysis would refocus the emphasis in libel litigation on the truth or falsity of the alleged defamation rather than the media's behavior in publishing it, thus fulfilling the goal of promoting accurate reporting.

Under an adapted version of the Japanese model, the plaintiff would have to plead with particularity: publishing of a materially false factual statement[172] that (1) concerned the plaintiff and (2) injured the plaintiff's reputation in the view of the statement's readers.[173] The media defendant's behavior would be judged under the negligence standard applied in Japan under article 230 of the Criminal Code and article 723 of the Civil Code for matters involving public concern. Unlike the Japanese standard, however, the plaintiff would first bear the burden of proving the statement was false. If the plaintiff succeeded, the burden would then shift to the media defendant, who could escape liability or mitigate damages by demonstrating that it acted without negligence and with the good-faith belief that the published statement was true.[174]

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172. The new standard would retain the U.S. fact-opinion distinction for libel, which holds: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz*, 418 U.S. at 339–40.

173. Bezanson proposes developing this standard of pleading through a new tort he calls "setting the record straight." The position argued in this Note departs from the Bezanson proposal at the point where Bezanson argues in favor of a quasi-strict liability standard, without addressing whether the media defendant can mitigate damages, or escape liability altogether, by proving that it believed the published statement was true. *See* BEZANSON et al., *supra* note 10, at 211–12.

174. Placing the initial burden of proof on the plaintiff is not unlike the approach outlined by Justice O'Connor in a case that involved alleged defamation of a private-figure plaintiff by a newspaper article of public concern. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1985) (holding that a private-figure plaintiff had the burden of proving falsity on the part of a media defendant in cases involving speech of public concern). O'Connor noted that in some cases, "requiring the plaintiff to show falsity will insulate from liability some speech that is

This new standard would apply in all cases, regardless of whether the plaintiff was a public official, public figure or private figure, and whether the issue involved private information or matters of public concern. In this respect it differs from the Japanese model of imposing strict liability for defamation involving private matters. Thus, the emphasis of litigation would be on the truth or falsity of the offending statement and actual harm to the individual rather than the status of the plaintiff and whether the media acted with reckless disregard for truth or falsity.

Shifting to the media defendant the burden of demonstrating a lack of negligence in believing the challenged statement was true is constitutionally defensible under current case law. Although classic actual malice analysis only requires the defendant to demonstrate that it did not act with reckless disregard for the truth in publishing the information, the standard has since been relaxed. The U.S. Supreme Court's 1979 decision in *Herbert v. Lando*[175] allowed plaintiffs discovery into editorial decisionmaking to determine whether the reporters and editors knew the information they were about to publish was false. In reality, this inquiry differs little from the Japanese standard[176] because it questions the degree of confidence the reporter had in publishing the statement. An investigation into whether the media defendant was reckless in publishing the information is not markedly different from determining whether its belief in the truth of the statement was negligent. Despite complaints that *Herbert* would inhibit press coverage,[177] studies conducted in the wake of the decision found little evidence that it had any real chilling effect.[178]

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false, but unprovably so." *Id.* at 778. But because the Constitution requires the Court to err in favor of protecting true speech in close cases, such a burden of proof allocation was necessary "[t]o ensure that true speech on matters of public concern [was] not deterred . . . ." *Id.* at 776.

175. 441 U.S. 153 (1979).

176. In writing for the majority in *Herbert*, Justice White noted:

> [W]e are urged by respondents . . . [that] requiring disclosure of editorial conversations and of a reporter's conclusions about the veracity of the material he has gathered will have an intolerable chilling effect on the editorial process and editorial decision-making. But if the claimed inhibition flows from the fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely what *New York Times* and other cases have held to be consistent with the First Amendment.

Id. at 171.

177. In his dissenting opinion, Justice Marshall argued:

> [H]ere the concern is not simply that the ultimate product may be inhibited, but that the process itself will be chilled. Journalists cannot stop forming tentative hypotheses, but they can cease articulating them openly. If prepublication dialogue is freely discoverable, editors and reporters may well prove reluctant to air their reservations or to explore other means of presenting information and comment. The threat of unchecked discovery may well stifle the collegial discussion essential to sound editorial dynamics.

Id. at 208–09.

178. *See* Bow & Silver, *supra* note 111, at 415. *But see* Labunski & Pavlik, *supra* note

Still, flatly rejecting the actual malice analysis would send shock waves through the journalistic community. But even assuming journalists do feel chilled by the possibility of becoming libel defendants, it is unclear whether the blended U.S.-Japanese libel standard proposed in this Note would increase their fears.[179] Several factors, including litigation costs, damage awards, libel insurance, and the time spent in defending libel suits, all contribute to the overall impact of libel law on the U.S. media.[180] Because actual malice is a difficult issue to determine,[181] it complicates and lengthens litigation. Some libel cases turning on actual malice have run for more than a decade.[182] This increased length of time increases, in turn, many of the other costs associated with libel litigation that could contribute to the chilling effect. Furthermore, because the proposed standard would obligate the plaintiff to plead material falsity, an element not currently required under the common law tort of defamation,[183] it would discourage frivolous litigation.

Moreover, there is little evidence to suggest the Japanese press has suffered from libel chill because it must show it was not negligent in publishing alleged libel.[184] As discussed previously, much of the self-

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111, at 17–19.

179. *But see* Stephen M. Renas et al., *An Empirical Analysis of the Chilling Effect: Are Newspapers Affected by Liability Standards in Defamation Actions?*, *in* COST OF LIBEL, *supra* note 119, at 48 (citing survey data that found that a change in the liability standard in public figure/public official defamation cases would chill the media).

Although this survey revealed that a change in liability standard would curb the media from publishing certain types of stories, the validity of the results is questionable. The researchers in this study sent surveys posing four hypothetical scenarios to media organizations asking editors and news directors whether they would publish the hypothetical information if the actual malice liability standard no longer existed. The study focused solely on liability issues and assumed that all other editorial decision-making factors remained constant. *Id.* at 45. Only 220 of the 1,688 surveys sent were returned. Of that number, only 206, or 12.2% of the population, were usable. *Id.* at 46. No evidence was cited indicating that those who responded to the survey actually understood the differences between the various legal standards used. Thus, the findings in this survey were based on a narrow, self-selected sample of a larger media population, a flaw the authors themselves acknowledge. *Id.* at 47.

180. *See supra* part II.A.

181. *See* BEZANSON et al, *supra* note 10 and accompanying text.

182. *See, e.g.*, Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) (15 years); Herbert v. Lando, 781 F.2d 298 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986) (12 years); Gertz v. Robert Welch, Inc., 680 F.2d 527 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983) (14 years). *See also* Anderson, *supra* note 22, at 510.

183. Defamatory statements under the common law were presumptively false because the law assumed people had good reputations. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 770 (1986). The *Sullivan* case and subsequent decisions arguably removed this presumption. *See Id.* at 775.

184. It is notable that in an abstract of 97 Japanese media research projects conducted in the early 1970s, not a single libel or defamation study was listed. *See* HIDETOSHI KATO, JAPANESE RESEARCH ON MASS COMMUNICATION: SELECTED ABSTRACTS (1974) (in English); *see also* JAPANESE COMMUNICATION, *supra* note 129 (listing abstracts of 100 studies conducted

censorship practiced by the Japanese media is voluntary.[185] Relatively few libel lawsuits are filed against the Japanese press,[186] and damage awards are much lower than those in the United States.[187] Some scholars argue that higher damage awards would more effectively deter future defamation than the compulsory public apology, but low damage awards remain the norm in Japanese libel litigation.[188] Sensationalist weekly magazines specializing in large photos and lurid coverage abound in Japan,[189] and printing unsubstantiated gossip is not considered unusual.[190] Mainstream Japanese journalists have been aggressive in their coverage of recent political scandals.[191] The subjects of such coverage have complained about the weakness of Japanese media laws and have called for reform, but little has changed in press coverage.[192]

Admittedly, the differences between U.S. and Japanese cultures inhibit direct comparisons of the chilling effect of libel suits in each country. The United States has a far more litigious society than does Japan, and the existence of the civil jury greatly affects U.S. libel verdicts.[193] Nevertheless, the Japanese media's experience suggests that the proposed libel standard would not cause a marked chilling effect on the U.S. press. Furthermore, introducing the new standard might lessen the other side of the chilling effect — the number of qualified people who decline to enter public life for fear of opening their reputations to

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in Japan between 1970 and 1979; no study addresses defamation).

185. *See supra* notes 129–32 and accompanying text.

186. *See supra* note 126.

187. *See supra* note 135.

188. *See* BEER, *supra* note 10, at 315.

189. *See* Burgess, *supra* note 133, at D1; Murray, *supra* note 133, at 9; Weisman, *supra* note 133, at A14.

190. After the "Peeping Tom" press, as it is known in Japan, published accounts by two women claiming to have had affairs with former Prime Minister Souske Uno, the scandal magazines printed rumors of numerous other unidentified women linked with the Prime Minister. The resulting sex scandal eventually led to Uno's resignation in 1989, after his party suffered a humiliating defeat at the polls. *See* Weisman, *supra* note 133.

191. *See* Roger Crabb, *Tense Time for Miyazawa as Sagawa Scandal Unfolds*, REUTERS, Aug. 30, 1992, *available in* LEXIS, Nexis Library, Wires File; David E. Sanger, *Japanese Party Warns Judiciary*, N.Y. TIMES, Nov. 8, 1992, §1, at 7; *Kaifu Demands Apology on What He Calls Groundless Reports*, JAPAN ECONOMIC NEWSWIRE, Aug. 11, 1989, *available in* LEXIS, Nexis Library, Wires File.

Coverage of the parliamentary scandal has led both top officials and Japan's largest newspaper to file libel suits against the Japanese media to clear themselves of involvement. *Politician, Newspaper in Libel Suits over Scandal Coverage*, UPI, Feb. 25, 1992, *available in* LEXIS, Nexis Library, Wires File.

192. *See* Murray, *supra* note 133; Hiroshi Nakamae, *Libel Furor Questions Ethics of Religious Group, Magazine*, THE NIKKEI WEEKLY, Nov. 9, 1991, *available in* LEXIS, Nexis Library, Omni File.

193. *See supra* note 163 and accompanying text.

attack. Although the number of members in this group is as unquantifiable as the number of stories that have not been published, society would surely benefit from *their* entrance into the marketplace of ideas as well.[194]

On the issue of damages, U.S. courts and legislatures should add mandatory retraction and apology to the arsenal of available remedies awarded to injured plaintiffs. In cases where an apology is ordered, the plaintiff would be limited to recovery for actual injury,[195] and a portion of both litigation costs and attorneys' fees.[196] As demonstrated by both the University of Iowa study and the recent NBC-General Motors experience, plaintiffs threaten libel suits to vindicate their reputation.[197] Plaintiffs tend to view monetary recovery, especially in early stages of litigation, as less important than setting the record straight.[198] Thus, adopting a damage formula that corrects falsehoods while allowing nominal monetary recovery furthers the objective of setting the record straight without subjecting the media to the chill of potentially exorbitant damages. Granted, social censure carries far greater weight in a homogeneous, cohesive nation like Japan than in a highly mobile and pluralistic society like the United States.[199] Nevertheless, the thought of having to commit advertising space to admit wrongdoing publicly would deter recklessly false reporting in the U.S. press. Furthermore, requiring apology *and* retraction goes one step further than the Japanese damage formula, which requires only an apology and not a correction, and which does not equate any admission of wrongdoing with the act of apology.[200]

Admittedly, the notion of court-ordered retractions and apologies raises constitutional questions concerning whether a court can compel speech under the First Amendment. U.S. courts have traditionally shied away from requiring the print media to publish specific types of

194. *See* BOLLINGER, *supra* note 22, at 36; Anderson, *supra* note 22, at 531 ("The actual malice rule obviously deters participation in public life.") (citation omitted).

195. Compensatory damages tend to be lower than punitive damages in libel litigation because the plaintiff must demonstrate actual injury stemming from the defamation. *See, e.g.*, Marcone v. Penthouse, 8 Med. L. Rep. (BNA) 1444 (E.D. Pa. 1982) (jury awarded $30,000 compensatory damages and $537,000 punitive damages; new trial ordered unless plaintiff accepted remittitur to $200,000 punitive).

196. The court could set the percentage awarded for costs and attorneys' fees on a case-by-case basis. Although this award arguably could merely substitute for punitive damages, allowing some recovery of attorneys' fees would lessen the chance that the proposed damage formula would preclude less wealthy plaintiffs from litigating their claims.

197. *See supra* notes 143–49 and accompanying text.

198. BEZANSON et al., *supra* note 10, at 24.

199. LAW AND SOCIETY, *supra* note 141, at 2.

200. BEER, *supra* note 10, at 315.

information[201] on the theory that those who disagreed with printed information had the right to publish their own response. Still, requiring mandatory retraction and apology is constitutionally defensible under the principles outlined in *Red Lion Broadcasting Co. v. FCC*,[202] which upheld the Federal Communications Commission's right to require fair coverage of both sides of political issues in the broadcast media under the "fairness doctrine."[203] The Court determined that such a requirement did not violate the First Amendment because the finite number of air frequencies limited the number of potential broadcasters. Thus, requiring equal viewpoint access over the airwaves promoted entrance into the marketplace of ideas.[204]

Despite the *Red Lion* opinion, the Court struck down a similar right-of-reply statute for newspapers five years later in *Miami Herald Publishing Co. v. Tornillo*[205] on the grounds that it allowed too much government interference into the publishing process. Although *Red Lion* is not specifically discussed in *Tornillo*,[206] the premise behind the Court's differing standards for broadcast and print media regulation seem grounded in Justice White's observation in *Red Lion* that "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[207] Still, the right of every individual to "speak, write, or publish" is limited by the person's ability to *circulate* his or her opinion to combat a falsehood released into the public domain by an established media outlet. Given the dwindling number of general

201. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

202. 395 U.S. 367 (1969).

203. Under the fairness doctrine, broadcasters "are required to spend a reasonable amount of time covering 'controversial issues of public importance,' and are thereby prohibited from airing entertainment programming exclusively." BOLLINGER, *supra* note 22, at 64. Also, "when covering controversial issues of public importance, [broadcasters] must be fair and balanced in the presentation of opposing viewpoints." *Id.* *Red Lion* involved an aspect of this doctrine, the "personal attack" rule, which required a broadcast station that carried a personal attack against an individual to give that person an opportunity to reply. 395 U.S. at 373–75 (citations omitted). The fairness doctrine has not been actively enforced since the Reagan Administration. BOLLINGER, *supra* note 22, at 83–84.

204. *See Red Lion*, 395 U.S. at 388–90.

205. 418 U.S. 241 (1974).

206. The Court noted that a newspaper is not subject to the finite-airwaves limitation confronting the broadcast media, but it rejected the notion that "as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available." *Id.* at 257.

207. *Red Lion*, 395 U.S. at 388.

circulation newspapers left in the United States[208] and cable television's ever-expanding range of channels,[209] the ease-of-entry distinction between print and broadcast media is now of questionable validity.

Moreover, a court-ordered retraction is distinguishable from a statutorily required right of reply. Requiring a newspaper to correct the injury it caused through libelous reporting is not the same as a government mandate forcing "a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor."[210] As noted previously, the new libel standard focuses only on factual defamation, not defamation found in opinions,[211] thus retaining the *Gertz* holding that "[u]nder the First Amendment there is no such thing as a false idea."[212] Awards of retraction and apology would be limited to libelous reporting, and would not require the media defendant to retract editorial opinions. Thus, journalists would not be forced to espouse editorial stances with which they disagreed. For the courts to require otherwise *would* run the danger of infringing the First Amendment right to free speech. Awarding the successful libel plaintiff the right of correction and apology, therefore, would not force the news pages open to anyone who disagreed with their coverage. Rather, it would facilitate correction of inaccurate reporting and dampen the skyrocketing attorneys' fees, damage awards, and insurance costs that libel litigation entails.

CONCLUSION

Adopting a Japanese-style approach to libel analysis and damage awards would provide societal benefits not achieved under U.S. libel analysis. Libel litigation under a modified Japanese approach would focus on the truthfulness of the allegedly libelous statement, rather than the plaintiff's status as a public official or public figure. Injured individuals would have their reputation restored through public apology and retraction of the defamatory falsehood. Because the truthfulness of the alleged defamation would be the central focus of libel litigation, the media would be subjected to fewer frivolous suits and, under the proposed damage formula, fewer potentially chilling damage awards. Finally, U.S. society would benefit from a system that promoted the

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208. Fourteen newspapers have folded or merged in the United States since January 1992. *See* Schmeltzer, *supra* note 140.

209. *See* Elizabeth Kolbert, *With 500 Channels, How Could Anyone Learn What's On?*, N.Y. TIMES, Jan. 4, 1993, at A1.

210. *Tornillo*, 418 U.S. at 261 (White, J., concurring).

211. *See supra* note 172 and accompanying text.

212. *Gertz*, 418 U.S. at 339.

reporting of truthful information and discouraged unnecessary litigation, thus restoring the balance between freedom of speech and freedom from libelous injury.